OCT 27 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 531

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

EASTMAN KODAK COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF THE
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No. October Term, 1956

Commonwealth of Pennsylvania,
Petitioner

v.

Eastman Kodak Company,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of The United States:

Petitioner, Commonwealth of Pennsylvania, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on June 25, 1956.

CITATIONS TO OPINIONS BELOW

The first opinion of the Court of Common Pleas of Dauphin County (R. 54a) is reported at 67 Dauphin County Reports 288. The opinion of the Court of Common Pleas of Dauphin County (R. 78a) overruling exceptions (R. 75a) of the Commonwealth of Pennsylvania to the aforesaid opinion is reported at 68 Dauphin County Reports 324. The opinion of the Supreme Court of Pennsylvania printed in Appendix A hereto, infra p. 39, is reported at 385 Pa. 607.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on June 25, 1956. A timely petition for rehearing (Appendix B, infra p. 50) was filed and the order of the Supreme Court of Pennsylvania denying the said petition of the Commonwealth of Pennsylvania for rehearing was entered on August 13, 1956.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3) since the validity of a state statute on grounds of repugnancy to the Constitution of the United States is drawn in question.

QUESTIONS PRESENTED

1. Is an allocated property tax upon the income of a foreign corporation engaged exclusively in interstate commerce derived from the use of tangible personal property having a permanent situs within a state, and regularly and continuously used in income producing activities within said state, a tax on the privilege of engaging in interstate commerce?

2. Is the Commerce Clause of the Federal Constitution violated by the imposition of an allocated state property tax upon the income of a foreign corporation engaged in interstate commerce within the taxing state where such income is derived from and produced by the following activities:

(a) The employment of fourteen full-time salesmen who regularly and continuously solicit business on behalf of the corporation within the taxing state, some of whom reside within the taxing state and devote their entire time and the remainder of whom devote a part of their time to the regular and continuous solicitation of business on behalf of the corporation within the taxing state;

(b) The employment of twenty-one full-time technical representatives who regularly and continuously demonstrate the corporation's products to dealers and other users within the state, some of whom reside within the taxing state and devote

their entire time and the remainder of whom devote a part of their time to such activity;

(c) The ownership of ten passenger automobiles, registered, titled and physically situated within the state, in the exclusive possession of the corporation's employees residing within the state, some of which are used exclusively and the remainder at least 75% of the time in connection with the aforesaid activities of the corporation's employees within the state;

(d) The regular and continuous negotiation of contracts and delivering of products to customers and users within the taxing state.

3. Does the fact that the major activity of a foreign corporation engaged in interstate commerce is the regular and continuous solicitation of interstate business immunize all local activities of the said corporation from state taxation?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is Article I, Section 8 of the Constitution of the United States providing:

> "The Congress shall have Power * * *
>
> * * * * * * * * * *
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The statute involved is the Corporation Income Tax Law of August 24, 1951, P. L. 1417, as reenacted and amended by the Act of December 27, 1951, P. L. 1763, 72 Purdon's Pennsylvania Statutes Annotated 3420n-1. The pertinent provisions of said act are:

> "§3420n-3. Imposition of tax
>
> "Every corporation carrying on activities in this Commonwealth or owning property in this Commonwealth by or in the name of itself or any person, partnership, joint-stock association or corporation shall be subject to and shall pay a State property tax on net income derived from sources within this Commonwealth at the rate of five per centum per annum upon each dollar of such net income received by and accruing to such corporation during the calendar years * * * "
>
> "§3420n-2. Definitions
>
> * * * * * * * * * *

"'Sources within this Commonwealth' includes tangible or intangible property located or having a situs in this Commonwealth, and any activities carried on in this Commonwealth, regardless of whether carried on in intrastate, interstate or foreign commerce.

"'Carrying on activities' shall include every act, power or privilege exercised or enjoyed in this Commonwealth as an incident to, or by virtue of, the powers and privileges acquired by the nature of the corporate organization."

The section also provides:

"'Net Income'. * * *

"2. In the case of corporations owning property or carrying on activities within and without this Commonwealth, other than corporations carrying on activities as insurance or surety companies, the net income of such corporations derived from sources within this Commonwealth for the fiscal or calendar year shall be determined by allocations and apportionments of net income as defined in clause one hereof, made as follows:

"(a) Gains realized and losses sustained from the sale or exchange of capital assets, if such assets consist of real estate or tangible personal property situated in the Commonwealth, shall be allocated to this Commonwealth.

"(b) Gains realized and losses sustained from the sale or exchange of capital assets, if such assets consist of real estate or tangible personal

property situated outside of the Commonwealth, shall not be allocated in any part of this Commonwealth.

"(c) The resultant net income, if any, after allocations, shall be divided into three equal parts:

"(1) Of one-third, such portion shall be attributed to the Commonwealth as shall be found by multiplying said one-third by a fraction whose numerator is the value of the corporation's tangible property situated within this Commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated:

"(2) Of one-third, such portion shall be attributed to the Commonwealth as shall be found by multiplying said one-third by a fraction whose numerator is the expenditures of the corporation for wages, salaries, commissions and other compensation to its employes and assignable to this Commonwealth, as hereinafter provided, and whose denominator is the total expenditures of the corporation for wages, salaries, commissions and other compensation to all its employes:

"(3) Of the remaining third, such portion shall be attributed to the Commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount of the taxpayer's gross receipts from property and activities assignable to this Commonwealth, as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its property and activities.

"In cases where only two of the foregoing three rules are applicable, the remainder of the net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, the part of the net income received from property and activities carried on within the Commonwealth shall be determined solely by that rule.

"The amount assignable to this Commonwealth of expenditures of the corporation for wages, salaries, commissions or other compensation to its employes shall be such expenditures for the taxable year as represent the wages, salaries, commissions or other compensation of employes to the extent of services rendered or work performed in the Commonwealth, [and similar expenditures to employes not chiefly situated at, connected with, or sent out from, premises for the transaction of business maintained by the corporation outside the Commonwealth.] [1]

"The amount of the corporation's gross receipts from property and activities assignable to this Commonwealth shall be: (1) the amount of its gross receipts for the taxable year from services rendered, work and contracts performed, and sales made, in the Commonwealth, [and all other gross receipts, except those negotiated or effected

[1] Provisions enclosed in brackets were deleted from the act by the amendments made by Act No. 571, approved May 24, 1956.

in behalf of the corporation by agents or agencies chiefly situated at, connected with, or sent out from, premises for the transaction of business maintained by the taxpayer outside of the Commonwealth, and except rentals and royalties and interest and dividends;] (2) rentals or royalties from property situated, or from the use of patents, within this Commonwealth; and (3) dividends and interest, except such dividends and interest attributable to the business conducted on premises maintained by the taxpayer outside the Commonwealth. [If a corporation maintains an office, warehouse or other place of business in a state other than this Commonwealth for the purpose of reducing its tax under this subsection, the department shall, in determining the amount of its gross receipts from property and activities assignable to this Commonwealth, include therein the gross receipts attributed by the corporation to the business conducted at such place of business in another state.] In the case of construction contracts negotiated or effected at an office in the State of Pennsylvania but performed outside the State, the gross receipts under such contracts shall be assignable outside the State, except that if the activities under any such contract to which the gross receipts are attributable shall occur partly within the State and partly outside the State, such proportion of the gross receipts under said contract shall be assignable to Pennsylvania as the direct and indirect costs incurred in Pennsylvania under the contract for the taxable year bear to the total

costs incurred thereunder for the taxable year. In the case of construction contracts negotiated or effected at an office outside the State but performed in the State, the gross receipts under such contracts shall be assignable to the State, except that if the activities under any such contract to which the gross receipts are attributable shall occur partly within the State and partly outside the State, such proportion of the gross receipts under said contract shall be assignable to Pennsylvania as the direct and indirect costs incurred in the State under the contract for the taxable year bear to the total costs incurred thereunder for the taxable year.

"A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditures of a corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred or received without the Commonwealth."

STATEMENT OF THE CASE

This case involves the question as to whether the regular and continuous income producing activities of the respondent corporation within the Commonwealth of Pennsylvania, and its ownership and use of property permanently situate therein authorize the imposition of a property tax upon the income derived therefrom, not withstanding the fact that said corporation is engaged exclusively in interstate commerce within the state where such activities are performed.

The Eastman Kodak Company is a New Jersey corporation engaged in the business of manufacturing and selling photographic equipment, supplies, etc. Its business is essentially intrastate since all activities in the connection with the manufacture have no interstate aspect. It sells its products throughout the United States and elsewhere, and to the extent that such sales involve solicitation of business and delivery outside of the state of manufacture it engages in interstate commerce. It is not the type of business which primarily involves interstate commerce, such as transportation and operation of pipelines.

During the year in question thirty-three of the corporation's employees regularly and continuously performed services on behalf of the corporation in Pennsylvania. Among the said employees were three full-time salesmen and eleven full-time technical representatives who resided in Pennsylvania. The salesmen regularly and continuously called on photographic

dealers in Pennsylvania to solicit business and take orders for company products. The technical representatives regularly and continuously demonstrated to dealers and other users of photographic products the proper method of using the same, but did not solicit or take orders. One salesman resident in Pennsylvania performed all of his services within the State. The remainder of the salesmen and technical representatives who resided in Pennsylvania performed a part of their services in Pennsylvania and a part outside of Pennsylvania. In addition to these salesmen and technical representatives residing in Pennsylvania, the company also employed nine salesmen and ten technical representatives residing outside of Pennsylvania who performed a part of their services within the State. These salesmen and technical representatives devoted their entire time to these activities and engaged therein regularly and continuously. Delivery of merchandise was regularly and continuously made by respondent to its Pennsylvania customers.

During the year in question the respondent owned ten passenger automobiles which were registered and titled in the respondent's name and ownership in Pennsylvania, and which were in the exclusive custody and possession of respondent's employees resident in Pennsylvania. Five of these automobiles were used in Pennsylvania 100% of the time; three were used in Pennsylvania 90% of the time, and the other two were used in Pennsylvania at least 75% of the time. Said automobiles were used by respondent's employees exclusively in connection with respondent's business (R. 11a to R. 18a). As a direct consequence of the foregoing activities and use of respondent's Pennsylvania

automobiles in furtherance thereof, the respondent received gross receipts of $1,640,455.00 from its customers in Pennsylvania (R. 36a). In addition thereto, respondent had other gross receipts of approximately $9,000,000.00 from sales in Pennsylvania which, because not directly produced by the activities of the aforesaid employees, were not taken into consideration in apportioning its income to the State (R. 50a). Respondent paid its above mentioned employees the sum of $100,590.00 for services rendered for work actually performed within Pennsylvania during the year in question (R. 35a).

In the settlement of the tax only property actually physically situated in Pennsylvania, only gross receipts received from Pennsylvania customers as a consequence of the activities of respondent's salesmen physically present in Pennsylvania, and only wages and salaries paid to respondent's employees for services actually rendered by them within the Commonwealth of Pennsylvania were included in the numerators of the apportionment fractions (R. 50a). The Commonwealth of Pennsylvania contends that the enumerated activities of the respondent combine to form a distinct local course of business or activity separate from the interstate aspect of respondent's manufacturing business sufficient to subject it to state taxation.

Manner of Raising Federal Question

In the Court of Common Pleas of Dauphin County, the court of first instance, the respondent in its pleading challenged the right of the Commonwealth to sub-

ject it to the Corporation Income Tax Law on the ground, inter alia, that the settlement violated the Commerce Clause (Article I, Section 8) of the Constitution of the United States (R. 4a). The court below, in sustaining said contention, made the following conclusions of law (R. 73a):

"2. The solicitation of business in Pennsylvania by its employees and the defendant's gross receipts from the products shipped to customers in Pennsylvania are not such local activities as to make them subject to taxation under the Corporation Income Tax Act of 1951.

"3. The solicitation of business in Pennsylvania by the defendant's employees and the defendant's gross receipts therefrom are such an integral part of interstate commerce that the same cannot realistically be separated from that commerce so as to make such activities subject to local taxation under the Act of 1951.

"4. The application of the compensation fraction and the gross receipts fraction under the Act of 1951 upon business solicited in Pennsylvania and the defendant's gross receipts from that business imposed a direct and undue burden on defendant's interstate commerce.

"5. The incidence of the tax imposed by the Act of 1951 is on defendant's privilege of engaging in interstate commerce, and the Act is therefore unconstitutional in its application to the defendant under the facts in this case.

"6. The property fraction in this case cannot be applied to the defendant's automobiles situated in Pennsylvania."

The Commonwealth of Pennsylvania filed its exceptions to said conclusions of law (R. 75a), which said exceptions were overruled by the Court of Common Pleas of Dauphin County (R. 78a-100a).

The Supreme Court of Pennsylvania affirmed the decision of the Court of Common Pleas of Dauphin County solely on the basis of the federal constitutional question in the following words: "For the foregoing reasons, we hold that the Corporation Income Tax Law of 1951 in its application to this defendant is a violation of the Interstate Commerce Clause and therefore unconstitutional". (Appendix A p. 39)

The Supreme Court of Pennsylvania in affirming the court below concluded that the activities of respondent within Pennsylvania were not of such a local nature as to be realistically separable from interstate commerce and that, accordingly, a tax upon the income produced thereby would violate the Commerce Clause of the Federal Constitution.

In its petition for reargument the petitioner challenged the conclusion of the Court to the effect that the numerous activities of respondent in the production of income within the Commonwealth of Pennsylvania carried on regularly and continuously by 33 of its employees within the State, and the use of ten motor vehicles permanently situated in the State in connection with such activities, and the delivery of respondent's products in the State did not constitute such local activity or doing a business as to make respondent liable to a tax upon the income produced by such activities (Appendix B p. 50).

REASONS FOR GRANTING WRIT

Petitioner contends that the Supreme Court of Pennsylvania misunderstood and misconstrued the decisions of the Supreme Court of the United States defining the nature of local activities of a corporation engaged in interstate commerce sufficient to subject such corporation to state taxation. In its opinion the Supreme Court of Pennsylvania (Appendix A p. 39) enunciated certain propositions which not only conflict with, but ignore leading decisions of the Supreme Court of the United States on the subject. Upon the authority of that opinion, every State statute purporting to impose a State tax upon the income of a foreign corporation derived from local activities in interstate commerce would, of necessity, be interpreted as a tax upon the privilege of engaging in interstate commerce and nullified.

The said opinion of the Supreme Court of Pennsylvania makes the following startling and revolutionary conclusions:

> (1) The opinion holds that income derived from the use of locally situated property in income producing activities is not subject to state taxation if the using corporation is engaged exclusively in interstate commerce, even though said property has a permanent legal situs in the taxing state.

(2) The opinion holds further that income derived from the solicitation of business by a corporation engaged in interstate commerce is never subject to state taxation regardless of the regularity and continuity of such solicitation, the extent and volume thereof, the number of persons engaged therein and the volume of business produced thereby.

(3) The opinion immunizes from state taxation the income of any corporation engaged in interstate commerce so long as any part of its activity within the taxing state involves the solicitation of interstate business.

The incongruous effect of the opinion is to nullify and render meaningless a taxing statute imposing a state tax on income derived from local activities in interstate commerce despite the Court's recognition of the general constitutionality of the said statute. If it is permitted to stand, there can be no such thing as a taxable local activity in interstate commerce in Pennsylvania.

The decision demonstrates the confusion that exists in the opinions of the courts and the uncertainty and bewilderment of most judges in approaching the subject of taxable local activities in interstate commerce. This inability of the state courts to comprehend the meaning of "taxable local activities in interstate commerce" is conceded by Mr. Justice Bell, the Justice of the Pennsylvania Supreme Court who wrote the opinion of which review is sought. In the case of *Roy Stone Transfer Corporation v. Messner et al.*, 377 Pa. 234

(1954), in considering the taxability of a corporation under the identical statute here under consideration, he stated at page 243:

> "It would be a Herculean, if not impossible task, to review and harmonize the myriad decisions of the Supreme Court of the United States on the subject of interstate commerce and exactly what incidents thereof may be constitutionally taxed by the States. The dissenting opinions in many of those cases make clear that the task of reconciling all the decisions is more difficult than was the task of Theseus as he threaded his way through the famous Cretan Labyrinth in search of the Minotaur. * * * "

Argument

Petitioner submits that the Supreme Court of Pennsylvania ignored the following basic principles defining the right of states with respect to the taxation of income derived from interstate commerce.

1. Income derived from interstate commerce may be subjected to state taxation so long as it is properly apportioned to activities within the taxing state. *Cheney Bros. Co. v. Massachusetts,* 246 U. S. 147 (1918); *U. S. Glue Co. v. Oak Creek,* 247 U. S. 321 (1918); *Atlantic Coast Line R. Co. v. Doughton,* 262 U. S. 413 (1923); *Basso, Ratcliff & Gretton, Ltd. v. Tax Commission,* 266 U. S. 271 (1924); *Roy Stone Transfer Corporation v. Messner,* supra.

2. Income produced by local activities or the local ownership of property by corporations engaged exclusively in interstate commerce may be subjected to state taxation. *West Publishing Company v. McColgan*, 328 U. S. 823 (1946); *Roy Stone Transfer Corporation v. Messner*, supra; *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649 (1942).

In the *West Publishing Company* case, the California Supreme Court defined the right of the state to tax such income in language which was approved by the Supreme Court of the United States. At 27 Cal. 705, at page 708, it is stated:

> "* * * plaintiff overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in interstate commerce and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause. (citing cases) * * * A state 'may tax net income from operations in interstate commerce, although a tax on the commerce is forbidden. United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; Shaffer v. Carter, supra. * * * ' Such power is so well recognized that appeals questioning it are dismissed by the United States Supreme Court for want of a substantial federal question. Memphis Natural Gas Co. v. State Tax Comm., 323 U. S. 682, 65 S. Ct. 440; Id.,

Miss., 19 So. 2d 477; Parke Davis & Co. v. Cook, 323 U. S. 681, 65 S. Ct. 436; Id., 198 Ga. 457, 31 S.E. 2d 728, 156 A.L.R. 1360."

3. The tax imposed in connection with local activities of corporations engaged in interstate commerce may be either a property or a privilege tax so long as it is not imposed upon the privilege of engaging in interstate commerce. *Memphis Natural Gas Co. v. Stone,* 335 U. S. 80 (1948) (franchise tax); *West Publishing Company v. McColgan,* supra (property tax); *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602 (1951); *McGoldrick, Comptroller of The City of New York v. Berwind-White Coal Mining Co.,* 309 U. S. 33 (1940) (excise tax); *Western Live Stock et al. v. Bureau of Revenue et al.,* 303 U. S. 250 (1938) (privilege tax).

This entire matter was summarized by the Court in *Underwood Typewriter Company v. Chamberlain,* 254 U. S. 113 (1920), wherein Mr. Justice Brandeis said at page 119:

> "* * * Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

4. The presence of property within a state or the performance of other activities therein by a corporation engaged exclusively in interstate commerce, if carried on regularly and continuously amounts to the doing of a local business subjecting the corporation to local taxation. *Nippert v. City of Richmond,* 327 U. S. 416 (1946); *Braniff Airways, Inc. v. Nebraska State*

Board, 347 U. S. 590 (1954); *Western Live Stock et al. v. Bureau of Revenue et al.*, supra.

The foregoing propositions made one principle crystal clear. A state tax on the income of a corporation derived from local activities in interstate commerce, if properly apportioned by means of allocation fractions which assign a fair proportion of the corporation's income to the taxing state does not burden interstate commerce. The Court below committed palpable error in unequivocally holding otherwise.

This case does not involve any question with respect to due process, the fairness of the allocation fractions, multiple taxation or any other objection which would cause it to violate the Federal Constitution. It imposes a tax in practically the same language as that used in *West Publishing Company v. McColgan*, supra.

Presence of Property Within Taxing State

The opinion of the Supreme Court of Pennsylvania failed to consider the liability to state taxation of a foreign corporation engaged in interstate commerce predicated upon the use of property in income producing activities within the Commonwealth. It concluded, however (Appendix A p. 39, infra), that because of the use of a property fraction in the allocation formula, a tax on income derived from local activities was: " * * * an attempted excise tax on defendant's interstate commerce business out of which there were no local activities which could be considered as not

an integral or realistically inseparable part of interstate commerce". The basis or rationale of the foregoing statement is difficult of comprehension. It assumes that the use of a property fraction in allocating income to a state results in the taxation of the privilege of using that property within the state and, consequently, if the property included in the numerator of the property fraction was used in interstate commerce, the tax is converted into a tax on the privilege of engaging in interstate commerce. This conclusion is inconsistent with the decisions of the Supreme Court of the United States which permitted the property fraction alone to be used to apportion income derived from interstate commerce to a state. For example, in *Underwood Typewriting Company v. Chamberlain*, supra, the only fraction used to determine the income to be allocated to the State of Connecticut was a property fraction, the numerator whereof was the value of real and tangible property within the state, and the denominator the value of all real and tangible property of the corporation owned everywhere. See *Kent-Coffey Mfg. Co. v. Maxwell*, 291 U. S. 642 (1934). The property fraction in the instant case is practically identical with that in the *Underwood* case except that intangible property is not included in either the numerator or denominator thereof.

Nature of Respondent's Local Activities

Petitioner submits that respondent's activities in Pennsylvania amount to the actual doing of business

within the State. The Court below refused to consider the nature or scope of these activities and concluded that so long as the corporation performing said activities was engaged in interstate commerce and the solicitation of business was the major part of such activity, the income produced thereby could not be subjected to State taxation.

The opinion of the Court overlooks and ignores the sole and basic legal question involved in the case, to wit, whether the numerous activities of the respondent in the production of income within the Commonwealth of Pennsylvania, carried on regularly and continuously by thirty-three of respondent's employees within the State, the use of ten motor vehicles permanently situated in Pennsylvania in connection with the regular and continuous solicitation of business and demonstration of respondent's products, and the regular and continuous delivery of respondent's products in Pennsylvania constitute such local activity or the doing of business within the State as to make respondent's corporation liable to a tax upon the income produced by such activities.

The conclusion of the Court (Appendix A p. 39) that the activities of respondent's twelve salesmen and twenty-one technical representatives in soliciting business and demonstrating its products regularly and continuously within the Commonwealth did not subject respondent to State taxation is contrary to the decisions of the Supreme Court of the United States in *General Trading Co. v. State Tax Commission of the State of Iowa,* 322 U. S. 335 (1944); *International Shoe Company v. Washington,* 326 U. S. 310 (1945); *Rob-*

bins v. Shelby County Taxing District, 120 U. S. 489 (1887); *Nippert v. City of Richmond*, supra.

The Court below (Appendix A p. 39) failed to give any consideration to the fact that respondent regularly and continuously made deliveries of its products within the Commonwealth of Pennsylvania. *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Co.*, supra.

Solicitation of Business as a Local Activity

The Court below concluded that the solicitation of business within a state, regardless of how regular and continuous the same might be, could not subject the income of a foreign corporation produced thereby to State taxation (Appendix A. p. 39). It concluded further that the fact of such solicitation immunized all other activities of the corporation from such taxation.

The decisions of the Supreme Court of the United States with respect to the taxability of solicitation of business in interstate commerce are confined to those cases where an attempt has been made to impose a tax upon the *privilege* of coming into a state irregularly and spasmodically for the purpose of soliciting interstate business. Therein, the Court has clearly distinguished that situation from the case where solicitation is so regular and continuous as to justify the conclusion that the solicitation is a permanent part of a continuing business. For example, where the only activity within the State of Iowa was the regular and

continuous solicitation of orders by a salesman from a corporation's headquarters in Minnesota, which orders were taken subject to acceptance in Minnesota, it was held that a use tax with the requirement that the corporation collect the tax and pay it to the state did not violate the Federal Constitution. *General Trading Company v. State Tax Commission of the State of Iowa,* supra.

In *Miller Brothers Company v. Maryland,* 347 U. S. 340 (1954), where the State of Maryland attempted to attach the motor vehicles of a corporation making deliveries within a state on purchases made in another state, Mr. Justice Jackson in denying the right of the State made the following significant statement at page 346:

> "The nearest support for Maryland's position is General Trading Co. v. State Tax Comm'n, 322 U. S. 335. * * * That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with

> no solicitation other than the incidental effects of general advertising. * * * "

In the instant case solicitation is only one phase of respondent's local income producing activities. The effect of the opinion of the Court below in holding respondent's solicitation of business as a non-taxable activity overrules the conclusion of the Supreme Court of the United States in the General Trading Company case in so far as the State of Pennsylvania is concerned.

The fact that regular and continuous solicitation of business alone is sufficient to bring a corporation within a taxing state is further illustrated by the case of *International Shoe Company v. Washington,* supra, wherein the question involved was the liability of a corporation, engaged only in the solicitation of interstate business in the State of Washington, for State Unemployment Compensation Taxes, and in proceedings in that State to recover Unemployment Compensation Tax payments. We quote from the opinion, at page 314:

> "The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some ad-

ditional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. International Harvester Co. v. Kentucky, 234 U. S. 579, 587; People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 87; Frene v. Louisville Cement Co., 77 U. S. App. D. C. 129, 134 F. 2d 511, 516. The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a substantial volume of merchandise regularly shipped by appellant to purchasers within the state. The court also held that the statute as applied did not invade the constitutional power of Congress to regulate interstate commerce and did not impose a prohibited burden on such commerce."

The statement of the Court at page 317 is most significant:

> " 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. * * * "

Likewise, the statement at page 321:

> " * * * The state thus has constitutional power to lay the tax and to subject appellant to a suit to

> recover it. The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax. * * * "

Even in the leading case of *Robbins v. Shelby County Taxing District,* supra, where the immunity of drummers to state taxation was enunciated, the Court clearly indicated that its conclusion applied only to drummers who came into a state for a temporary purpose, and not to those who were engaged in a regular and continuous course of business. Mr. Justice Bradley stated at page 493:

> " * * * But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; * * * "

An analysis of all the cases denying to the states the authority to impose a tax upon the solicitation of interstate business beginning with *Robbins v. Shelby County Taxing District,* supra, down to the present time discloses that each case dealt with a statute or ordinance imposing a license fee or a direct tax upon the privilege of soliciting business in interstate commerce. No case was concerned with the liability for state taxation of a corporation engaged in such activity where the tax was not upon the privilege of soliciting business or upon the privilege of engaging in the interstate commerce itself. These cases clearly illustrate that the facts in the present case do not establish a "drummer case".

The foregoing statement is confirmed by the language of Mr. Justice Stone in *McGoldrick, Comptroller*

of the City of New York v. Berwind-White Coal Mining Co., supra, at page 55 where, in holding that delivery was a sufficient local activity to impose liability for a sales tax upon a corporation engaged in interstate commerce and making delivery in the state through a common carrier, he stated:

> "It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following Robbins v. Shelby County Taxing District, 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. * * * *It is enough for present purposes that the rule of Robbins v. Shelby County Taxing District, supra, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate,* compare Robbins v. Shelby County Taxing District, supra, with Ficklen v. Shelby County Taxing District, 145 U. S. 1; see Howe Machine Co. v. Gage, supra; Wagner v. Covington, supra; and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case." (Emphasis supplied)

The case of *Nippert v. Richmond*, supra, completely answers any argument that this is a drummer case, and is authority for the imposition of the tax upon this

respondent. That case involved an ordinance of the City of Richmond requiring all solicitors, including persons soliciting business in interstate commerce, to obtain a license. The court went to great lengths to distinguish between *International Shoe Company v. Washington,* supra, and *McGoldrick, Comptroller of the City of New York v. Berwin-White Coal Mining Co.,* supra, and pointed out that solicitation, when conducted regularly and continuously within a state so as to constitute a course of business, may be doing business just as is the making of delivery. The tax in the *Nippert* case was invalidated because of the fact that the appellee solicited in Richmond a total of only five days; that there was no showing that she intended to return later for the same purpose, and, if so, whether regularly and indefinitely, or only occasionally and spasmodically. The court concluded that continuous and regular solicitation of business within a state, which certainly is borne out by the facts herein, is such a local activity as to justify state taxation. This respondent could not deny that its solicitation and other activities in Pennsylvania are regular and continuous, and that it intends to carry on these same activities indefinitely in the future. The salaries paid, the value of the property employed, and the gross receipts and profits produced by these activities clearly indicate a substantial, continuous local income producing activity.

In the *Nippert* case the Court made the following significant statement at page 426:

> "* * * we put aside any suggestion that 'solicitation,' when conducted regularly and continuous-

ly within the State, so as to constitute a course of business, may not be 'doing business' just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable. * * *

"The sales and the deliveries in the Berwind-White case were regular, continuous and persistent. They constituted a 'course of business'. There was no suggestion, nor any basis in the facts for one, that they were only casual, spasmodic or irregular. * * * There was no showing that, apart from . . . five days, appellant had solicited previously in Richmond, that she intended to return later for the same purpose or, if so, whether regularly and indefinitely or only occasionally and spasmodically."

The Court further pointed out that the tax involved operated only upon out-of-state operators, and was, consequently, discriminatory, and had an exclusionary effect. It also stated that, since this was a municipal tax, the potentialities involved in the enactment of a similar tax by other municipalities within the state were obvious in their cumulative effect. Neither of these objections can be validly asserted here.

In the leading case of *West Publishing Company v. McColgan,* supra, which involved a California tax almost identical with the one under consideration, the major part of the activities conducted by the taxpayer in California was the solicitation of interstate business.

The Pennsylvania Corporation Income Tax Act does not tax the privilege of engaging in interstate commerce, nor does it tax the privilege of performing the specific activities hereinbefore enumerated. The tax is upon income produced by these activities in Pennsylvania, and not elsewhere, income that is fairly apportioned to Pennsylvania and which, under the Due Process Clause of the Constitution, cannot be taxed elsewhere.

Local Activities in Respondent's Business Realistically Separable from Interstate Commerce

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The respondent is a manufacturing corporation whose business is essentially intrastate. Its primary purpose is the manufacture of its products. Only in connection with the sale and distribution of its manufactured products does it engage in any interstate activity. This is the type of business the purpose and activity of which cannot be characterized as interstate commerce per se.

Petitioner submits that only in cases involving the receiving, transporting or landing of passengers or property in connection with interstate commerce has your Honorable Court refused to recognize that there may be taxable local activities of a corporation engaged in interstate commerce. In *Joseph et al. v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), it was held that loading and unloading were essential parts of the transportation itself. Loading and un-

loading were held to be the beginning and the end of interstate commerce and, therefore, inseparable therefrom. Obviously, the business of transporting merchandise for hire cannot be carried on without the loading or picking up thereof and the delivery or unloading thereof.

In *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90 (1937), the Court held that interstate commerce ended with delivery so far as the transportation company was concerned and that such delivery was an inseparable and nonlocal incident of interstate commerce. However, in the *Berwind-White* case, supra, where a corporation not engaged in interstate transportation was involved it was held that delivery by it was a local incident of interstate commerce.

Likewise, in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 (1953), the right of the State of Texas to impose a tax upon the occupation of taking gas for immediate interstate transportation by an interstate national gas pipe line company was involved. The Court stated that the taking of gas into a pipe line was the entry of the gas into interstate commerce and involved the principle that taking and unloading by a transportation company are inseparable from the unbroken interstate process. The Court relied upon *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196 (1885), for the proposition that "receiving and landing passengers and freight is incident to their transportation", and concluded that transportation involved the unbroken process of interstate commerce.

At the same term the Court decided *Railway Express Agency, Incorporated v. Commonwealth of Vir-*

ginia, 347 U. S. 359 (1953), which involved a tax on express companies upon the gross receipts derived from interstate transportation of property. Mr. Justice Jackson stated at page 368:

> "* * * It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax. Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 95 L. ed. 573, 71 S. Ct. 508; Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U. S. 389, 96 L. ed. 436, 72 S. Ct. 424; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396; New Jersey Bell Tel. Co. v. State Board of Taxes & Assessments, 280 U. S. 338, 74 L. ed. 463, 50 S. Ct. 111."

On the other hand, the regular and continuous solicitation of business, the taking of orders, demonstration and delivery of products are incidents of sales in interstate commerce, but are not inseparable therefrom. The activities of salesmen within a state may give rise to an interstate shipment, loading and delivery, but are not a part of that process. Thus in *Memphis v. Stone,* supra, the maintenance of pipe lines was essential to the transportation of gas flowing through said lines in interstate commerce, but was, nevertheless, a local activity separate and distinct from said transportation.

The fact that interstate transportation and intercourse may be induced by local activities of respondent

does not affect the right of the State with respect to taxation. This principle was enunciated in *Western Live Stock v. Bureau of Revenue*, supra, at page 253, where the Court stated: "Nor is taxation of a local business or occupation, which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business".

The conclusion of the Court below is based upon the assumption that if interstate commerce cannot be accomplished without the performance of the particular activity, said activity is inseparable and an integral part thereof, and cannot be taxed. The error of this assumption is self-evident. In *Memphis Natural Gas Co. v. Stone*, supra, the transportation of gas through the State of Mississippi by pipe line could not have been accomplished without the maintenance of said pipe lines. The work done by the employees in Mississippi was essential to that transportation. Likewise, in the *Berwind-White* case, supra, the interstate sale of coal could not be completed without the delivery, which was the subject of the tax. Since delivery in the instant case is made by the vendor engaging in interstate commerce, even though it uses an interstate carrier to make such delivery, it is performing a local activity within Pennsylvania which, combined with other income producing activities in Pennsylvania, subjects it to local taxation. In the *West Publishing Company* case, supra, the interstate sale and shipment of books could not have been accomplished without the solicitation of business in California. Nevertheless, these activities which made the interstate commerce possible

were held to be of a local nature, and sufficient to justify state taxation.

The activities of respondent corporation constitute such a continuous and regular course of conduct as to combine to form a distinct and separate local activity within Pennsylvania. The Corporation Income Tax as applied to respondent taxes income which is fairly and reasonably apportioned to the State by means of allocation fractions which have been carefully limited so as to make certain that only the income produced by such activities are taxed.

In the instant case the corporation has tangible property permanently situated in Pennsylvania. It has wages and pay roll in Pennsylvania payable to employees, some of whom reside therein permanently and devote their entire time to the corporation's activities in Pennsylvania, its salesmen take orders in Pennsylvania and it makes delivery of merchandise in Pennsylvania. In addition thereto, other employees permanently residing in Pennsylvania are continuously engaged in demonstrating its products to customers and other users. If the foregoing activities are not sufficient to bring respondent corporation within Pennsylvania's taxing power, then it is impossible to envision any situation wherein a state would have the right to tax a corporation engaged exclusively in interstate commerce.

Conclusion

It is respectfully submitted that the error implicit in the opinion of the Supreme Court of Pennsylvania in the instant case clearly demonstrates the necessity for the enunciation of a precise definition of the meaning of the terms "local activities in interstate commerce" or "local incidents of interstate commerce". It also demonstrates the need for guidance to the several State courts as to when an activity of a corporation may be realistically separable from and not an integral part of interstate commerce. Until such a pronouncement is made the confusion of the State courts, which is demonstrated by the opinion of the Supreme Court of Pennsylvania in this case, and the uncertainty as to the legality of State tax laws affecting interstate commerce, will remain in doubt. The facts in this case present an ideal situation whereby the matter can be resolved and the right of the states definitely determined.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE SUPREME COURT OF PENNSYLVANIA

Bell, J. Filed: June 25, 1956

The Commonwealth sought to tax defendant, a foreign corporation engaged in interstate commerce, on its net income for the year 1951 under the Corporation Income Tax Law of (December 27) 1951.* The lower Court held that the resettlement and imposition of the tax by the fiscal officers of the Commonwealth violated the Interstate Commerce Clause since it imposed a tax on the defendant's privilege of engaging in interstate commerce. From a judgment entered in favor of Eastman Kodak Company the Commonwealth has appealed.

Defendant is a business corporation which is engaged in interstate commerce. It is organized under the laws of New Jersey and has its business office and manufacturing plant in Rochester, N. Y. It is engaged in the business of manufacturing and selling photographic equipment and supplies and certain other products. All manufacturing of business products and research activities are performed wholly outside of Pennsylvania. It maintains no office or place of business in Pennsylvania; it is not registered to do business in Pennsylvania; it makes no contracts in Penn-

* P. L. 1763, 72 PS 3420n.

sylvania. All of its assets are owned, held and used by it wholly outside of Pennsylvania, with the exception of 10 automobiles which are used by defendant's employees who solicit business mostly in Pennsylvania. Five of those automobiles were used regularly in Pennsylvania by defendant's salesmen; the remainder were used partly in Pennsylvania and partly in other States. Those 10 automobiles, valued at $13,569., were the only tangible property of the defendant located in Pennsylvania.* The value of all tangible and intangible property and real estate of the defendant outside of Pennsylvania was $533,370,496.

Defendant employed, in the year 1951, three salesmen who resided in Pennsylvania, one of whom performed all of his services in Pennsylvania; and 11 technical representatives who resided in Pennsylvania and who demonstrated to dealers and other users of photographic products the proper method of using defendant's products. Four of these employes performed all their services in Pennsylvania; the other 7 performed their services in Pennsylvania and in other States. In every instance defendant's products were shipped by mail or by common carrier into Pennsylvania from outside the State. All of Eastman's employes who perform any services in Pennsylvania are connected with and sent out, and all of their activities are supervised and directed from premises for the transaction of business maintained by Eastman in New York City and Rochester, N. Y.

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* Under the Act of May 1, 1929, P. L. 905, Article IV, §401 (a) (c), as amended: 75 PS 91, known as the Pennsylvania Motor Vehicle Code, these automobiles were required to be registered and licensed in Pennsylvania.

The principles in this fertile field of taxation of interstate commerce are easy to state, but often very difficult to apply. It has been aptly described as a field of "nice distinctions": *Keystone Metal Co. v. Pittsburgh*, 374 Pa. 323, 327, 97 A. 2d 797; *McLeod v. Dilworth Co.*, 322 U. S. 327, 329; *Galveston H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 225.

The Corporation Income Tax Law of 1951 is a "catch-all" Act which seeks to impose a so-called property tax on the net income of a corporation based on a three-fold formula, viz., all tangible property in Pennsylvania; all wages which are "assignable" to Pennsylvania; and all gross receipts from "property and activities" "assignable" to this Commonwealth "excluding income for which the corporation is subject to taxation under the Corporate Net Income Tax Act of May 6, 1935, P.L. 208, as amended. The true nature of the tax is apparent from the following provisions of the Act: "A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditures of a corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred or received without the Commonwealth."

In *Roy Stone Transfer Corporation v. Messner*, 377 Pa. 234, 103 A. 2d 700, we held the Corporation Income Tax Law of 1951 was unconstitutional as applied to the plaintiff in that case in that it violated Article I, §8 (3) of the Constitution of the United States—the Interstate Commerce Clause. In that case plaintiff was a foreign corporation which was engaged in the transportation of property as a common carrier in in-

terstate commerce; it had no tangible or intangible property in Pennsylvania; it paid no wages in Pennsylvania; it made no contracts in Pennsylvania; and it had no employes doing any kind of work in Pennsylvania except driving its trucks in interstate commerce. All of the factors present in the *Roy Stone* case are present here, except that Eastman owns 10 automobiles located in Pennsylvania and several of its representatives demonstrate to dealers and other users of photographic products in Pennsylvania the proper method of using defendant's products. We do not consider these additional factors sufficient to constitute local activities within the meaning of the decided cases. The distinction between the Act of 1935, which taxes the net income of corporations which have tangible property in Pennsylvania or are engaged in local activities in Pennsylvania, and the Act of 1951, was pointed out in the *Roy Stone* case on page 239 of that opinion: "While each formula has the same three factors—tangible property in Pennsylvania, wages paid, and gross receipts—under the 1935 Act the wages paid are applicable to persons employed in Pennsylvania and the gross receipts are likewise restricted to receipts from business conducted in Pennsylvania; whereas the 1951 Act applies to and includes wages payable to *employees employed outside of Pennsylvania which may be attributable to the work they perform in Pennsylvania,** and the gross receipts to business *attributable* to Pennsylvania, *but negotiated or performed by persons employed outside of Pennsylvania.*

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* Italics ours.

"The Corporate Net Income Tax Act of 1935 imposing a tax on the net income of a corporation based upon its tangible property in Pennsylvania and the wages paid to its employees in Pennsylvania, and that part of its gross receipts attributable to business carried on within Pennsylvania, was declared to be a property tax in spite of the declaration in the Act that it was an excise tax; and as such, its Constitutionality was sustained: Blauner's Inc. v. Philadelphia, 330 Pa. 342, 345, 198 A. 889; National Biscuit Co. v. Philadelphia, 374 Pa. 604, 612, 98 A. 2d 182; Murray v. Philadelphia, 364 Pa. 157, 169, 71 A. 2d 280; Philadelphia v. Samuels, 338 Pa. 321, 326, 12 A. 2d 79; see also to the same effect, Kelley v. Kalodner, 320 Pa. 180, 181 A. 598."

The Corporation Income Tax Law of 1951 states that it imposes a property tax on net income of certain corporations. While this declaration is entitled to weight, the nature of a tax depends upon its incidence, not upon its label. If, therefore, in reality, i.e., in its practical operation and effect, the tax is not what it purports to be, the realities control. *Railway Express Agency, Inc. v. Virginia*, 347 U. S. 359; *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 608; *Dawson v. Kentucky Distillers Co.*, 255 U. S. 288, 292; *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, 190; *Memphis Steam Laundry v. Stone*, 342 U. S. 389; *Roy Stone Transfer Corp. v. Messner*, 377 Pa., supra; *Murray v. Philadelphia*, 364 Pa. 157, 71 A. 2d 280; *Armour & Company v. Pittsburgh*, 363 Pa. 109, 112, 69 A. 2d 405; *Arrott's Estate*, 322 Pa. 367, 185 A. 697; *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 615, 98 A. 2d 182.

The *Roy Stone* case analyzed and reviewed many decisions of the Supreme Court and several of this Court and then summarized the pertinent principles: "1. A State may not impose a tax on interstate commerce or the receipts therefrom or the privilege of carrying it on. 2. A State may impose and collect taxes on corporations engaged exclusively in interstate commerce under the following conditions: (a) The tax must be predicated upon the ownership of property within the taxing State, *or upon local activities which occur within the State and are not an integral or realistically inseparable part of interstate commerce.** (b) The property or activity taxed must be of such a local nature that it may not become the object of multiple State taxation. (c) The tax must be fair and reasonable and there must be no discrimination between corporations engaged in interstate and intrastate commerce."

In *Norton Company v. Illinois*, 340 U. S. 534, the constitutionality of an Illinois gross receipts business or occupation tax "upon persons engaged in the business of selling tangible personal property at retail in this State" was determined by the Supreme Court, Norton Company, a Massachusetts corporation, operated a branch office and a warehouse in Chicago, from which it made local sales at retail. The Chicago place of business carried a large inventory and consummated therefrom direct sales to people in Illinois. It also acted to reduce freight costs to local consumers and took orders for merchandise which it did not have in the local store. The local office likewise performed services helpful in Norton's competition for Illinois

* Italics ours.

trade. The Court sustained the tax as applied to sales of goods shipped from a foreign State to taxpayer's retail store in Chicago and there sold to Illinois customers, but held it unconstitutional as to shipments made direct to customers by mail or common carrier. The Court said (page 537): "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office of acceptance, filling, and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. McLeod v. Dilworth Co., 322 U. S. 327 [sales tax]. Of course, a state imposing a sales or use tax can more easily meet this burden, because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor."

As the Supreme Court said in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157: "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only *if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it.** Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 87 (1948); Western Livestock v. Bureau of Revenue, supra at 258."

The Commonwealth resettled or determined defendant's tax under the Corporation Income Tax Law of 1951 under its three-fold formula: (1) it took as the

* Italics ours.

numerator of its first part the tangible personal property, viz., $13,569., located in Pennsylvania, and as its denominator the value of all defendant's tangible property wherever situate, namely $288,639,729. (2) The numerator of its second fraction represented the expenditures of defendant for wages, salaries, commissions, and other compensation paid by it *at its home office* to its employes "attributable" or assignable to the extent of services rendered or work performed in Pennsylvania. The denominator of the said fraction represented the total of all such expenditures to all of defendant's employes. (3) The numerator of the third or gross receipts fraction represented defendant's gross receipts from sales to Pennsylvania customers solicited by defendant's salesmen in Pennsylvania, all of whose work or activities were supervised and directed from offices outside of Pennsylvania and contracts for the said sales were made outside of Pennsylvania. The denominator of the said fraction represented the amount of defendant's gross receipts from all defendant's activities and business everywhere. The total taxable income determined by the Commonwealth was $115,975.57 and the tax (at the rate of 5%) amounted to $5798.78.

Notwithstanding the fact that the Act seeks to impose what it calls a property tax, it is clear that the tax, at least as far as the present defendant is concerned, is an excise tax for the privilege of doing business in Pennsylvania. Cf. *Roy Stone Transfer Corp. v. Messner,* 377 Pa., supra. The formula which the Commonwealth applies to this defendant makes crystal clear, if it were not otherwise so, that this tax is not a property tax on the local property of defendant, name-

ly, ten automobiles or on the income from local activities as such—it is an attempted excise tax on defendant's interstate commerce business out of which there were no local activities which could be considered as not an integral or realistically inseparable part of interstate commerce.

This case is ruled by *Roy Stone Transfer Corp. v. Messner,* 377 Pa., supra, and the cases therein cited; *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U. S., supra; *Joseph v. Carter & Weeks Stevedoring Company,* 330 U. S. 422; *Railway Express Agency, Inc. v. Virginia,* 347 U. S. 359. In *Railway Express Agency, Inc. v. Virginia,* 347 U. S., supra, the Court declared unconstitutional a Virginia statute attempting to impose a gross receipts tax upon express companies engaged in interstate commerce. The Court said, inter alia: "This appeal from the Supreme Court of Appeals of Virginia presents another variation in the seemingly endless problems raised by efforts of the several states to tax commerce as it moves among them. . . . Virginia provides by statute a separate and detailed system of taxation for express companies. It allocates to state taxation, free of all local levies, two kinds of property viz., intangible personal property and money. It sets off real estate and tangible personal property for local levies at the same rates as other similar properties. These, taxable at different rates, are all included in the statute under the rubric 'Taxes on property of express companies.' Then follows a section headed 'Annual license tax' providing that 'for the privilege of doing business in this State' express companies shall pay 'in addition to . . . the property tax as herein provided' an 'annual tax' upon gross receipts

earned in the State * 'on business passing through, into or out of this State.'

". . .

"The State counters with the contention that we should regard this, not as a privilege tax, even though it was labeled as such by the statute imposing it, but, instead, as a property tax measured by gross income and laid on the intangible value of good-will or going-concern status. The Corporation Commission said that the physical properties were assessed at dead value or bare-bones value for local taxation, while here the 'live, or going concern value' is being separately taxed by the State 'for the protection and services rendered by it.' . . . 'neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect,' Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, in which inquiry 'we are concerned only with its practical operation.' Lawrence v. State Tax Comm'n, 286 U. S. 276, 280. See Wisconsin v. J. C. Penney Co., 311 U. S. 435, 443-444.

". . . the practical effect of the tax conforms to its statutory description as one whose impact is squarely upon gross receipts without consideration of their effect on the value of any of the classes of property recognized elsewhere in the statute. A summary of appellant's total taxation for 1951 will illustrate this point. . . .

"Appellant's tax under the questioned portion of the statute, amounted to $66,454.71, so that its tax on a

* Italics ours.

gross-receipts basis was over fifty percent of the total value of its real and tangible personal property *. . . .

". . . But the tax in dispute here does not depend on owning any physical property, nor upon the value thereof, but would be levied on gross revenues even if the company found some way to dispense with all local, physical property." This language is equally applicable to the instant case.

We have so recently analyzed in *Roy Stone Transfer Corporation v. Messner*, 377 Pa., supra, the case of *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, *West Publishing Co. v. McColgan*, 328 U. S. 823, and other cases relied upon by appellant, which are clearly inapplicable, that we do not consider it necessary to do more than reiterate that in those cases the tangible property located in the State and the many local activities and services carried on within the State distinguish them from the instant case.

For the foregoing reasons, we hold that the Corporation Income Tax Law of 1951 in its application to this defendant is a violation of the Interstate Commerce Clause and therefore unconstitutional.

Judgment affirmed.

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* In the instant case the total value of all of defendant's property in Pennsylvania, viz., ten automobiles, was only $13,569., but the tax at 5% amounted to $5,798.78.

APPENDIX "B"

PETITION FOR REARGUMENT

To the Honorable, the Justices of the Said Court:

The Commonwealth of Pennsylvania, appellant in the above-captioned action, by its attorneys, Edward Friedman, Deputy Attorney General and Herbert B. Cohen, Attorney General, respectfully petitions your Honorable Court for reargument of the issues presented by said appeal and for the reconsideration of the conclusions and ruling of the opinion of the Court filed on June 25, 1956, by Mr. Justce Bell.

The Commonwealth avers that such reargument should be granted for the following reasons:

1. The opinion of the Court overlooks the sole and basic legal question involved in the case, to wit, whether the numerous activities of the appellee in the production of income within the Commonwealth of Pennsylvania, carried on *regularly* and *continuously* by thirty-three of appellee's employees within the State, the use of ten motor vehicles permanently situated in Pennsylvania in connection with the *regular* and *continuous* solicitation of business and demonstration of appellee's products, and the *regular* and *continuous* delivery of appellee's products in Pennsylvania constitute such local activity or the doing of business within the State as to make appellee's corporation liable to a tax upon the income produced by such activities.

A. The opinion of the court does not consider the matter of the liability to State taxation of a foreign corporation engaged in interstate commerce derived from the use of property in income producing activities within the Commonwealth, notwithstanding its own rule enunciated in *Roy Stone Transfer Corporation v. Messner*, 377 Pa. 234, at 243, to the effect that a tax on receipts from interstate commerce may be predicated on the ownership of property within the taxing state (Appellant's Brief, p. 57).

B. The conclusion of the Court (p. 2) that the activities of appellee's twelve salesmen and twenty-one technical representatives in soliciting business and demonstrating its products regularly and continuously within the Commonwealth did not subject appellee to State taxation is contrary to the decisions of the Supreme Court of the United States in *General Trading Co. v. State Tax Commission of the State of Iowa*, 322 U. S. 335 (1944); *International Shoe Company v. Washington*, 326 U. S. 310 (1945); *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887); *Nippert v. City of Richmond*, 327 U. S. 416 (1946) at 426 (Appellant's Brief, p. 3; Record, p. 12a-13a; Stipulation of Facts, paragraphs 3, 4 and 5).

C. The opinion of the Court (p. 3) fails to give any consideration to the fact that appellee regularly and continuously made deliveries of its products within the Commonwealth of Pennsylvania. (Appellant's Brief, p. 13; *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940)).

2. The opinion of the Court (p. 3) misconstrues the Corporation Income Tax Law where it states that

"The true nature of the tax is apparent from the following provisions of the Act: 'A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditures of a corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred or received without the Commonwealth' " by indicating that said provisions authorizes the consideration of activities beyond the borders of the Commonwealth, whereas its real meaning is that only in those cases where there are gross receipts, salaries and wages and tangible personal property within the Commonwealth are all three factors considered in determining what income is assignable to Pennsylvania, and where any of the said factors do not occur within the Commonwealth, the remaining factors only are considered and one-third fraction applied on the basis of each such factor (Appellant's Brief, 2-66).

3. The opinion of the Court (p. 4) erroneously concludes that "All of the factors present in the *Roy Stone* case are present here, except that Eastman owns ten automobiles located in Pennsylvania and several of its representatives demonstrate to dealers and other users of photographic products in Pennsylvania the proper method of using defendant's products. We do not consider these additional factors sufficient to constitute local activities within the meaning of the decided cases"; whereas the stipulated facts are that fourteen of appellee's employees permanently residing in Pennsylvania and nineteen other of its employees, nonresidents of Pennsylvania, regularly and continuously engaged in income producing activities within

the Commonwealth; that deliveries of appellee's products were regularly and continuously made within the Commonwealth of Pennsylvania, and the ten automobiles referred to in the opinion were regularly and continuously used in connection with the appellee's income producing activities within the State, all of which items were not present in the *Roy Stone* case (Appellant's Brief, pp. 2, 3 and 4; Record 12a-13a).

4. The opinion of the Court (p. 4) erroneously emphasized the fact that defendant's employees, working in Pennsylvania, were employed outside the State, and that the gross receipts produced by their activities were negotiated or produced by persons employed outside of Pennsylvania, whereas only wages and salaries paid to appellee's employees for services actually performed within the Commonwealth of Pennsylvania, and only gross receipts produced by the activities of these particular individuals within Pennsylvania were considered in the determination of the numerator of the gross receipts and wages and salaries fractions (Appellant's Brief, p. 4; Record, p. 16a-17a).

4 a. The opinion of the Court (p. 6) erroneously quotes dictum in the case of *Norton Company v. Illinois*, 340 U. S. 534 (pp. 6 and 7) to the effect that "the mere act of advertising or sending drummers into other states to solicit orders does not give said State a local grip on the seller". The said case involved the liability of an out-of-state vendor for Illinois *Sales Tax* in connection with *mail orders* sent out from Illinois to vendors to out-of-state places of business and filled therefrom. This is fully demonstrated by the statement of Justice Jackson (p. 537) "but no solicitors

worked the territory either out of the home office of Chicago branch". The quoted statement with respect to solicitation was an irrelevant and gratuitous remark which had no bearing upon the issue in the case. Likewise, the case of *McLeod v. Dilworth Co.*, 322 U. S. 327, cited in connection with the said *Norton* case (p. 7), involved the liability for sales tax in connection with the sale of property where title passed outside the taxing jurisdiction. Neither of said cases involved any question as to whether the regular and continuous performance of income producing activities within a state by a corporation engaged in interstate commerce was sufficient to subject such corporation to local taxation. Furthermore, the settlement in the present case eliminated all mail orders from the numerator of the gross receipts fraction, thus reducing the actual gross receipts from all sources in Pennsylvania of $10,282,-156.58 to the gross receipts actually produced by the activities of appellee's employees within Pennsylvania, to wit, $1,640,455.33 (Record, p. 58a).

5. The opinion of the Court (p. 8) erroneously emphasized the fact that the numerator of the wages and salaries fraction represented expenditures by appellee at its home office and that the numerator of the gross receipts fraction represented gross receipts produced by salesmen whose activities were supervised and directed from offices outside of Pennsylvania, and contracts for sale which were made outside of Pennsylvania. Appellant submits that the place from which the wages were paid or where the contracts were approved, or from which the employees' activities were supervised, can have no effect upon determining whether or not the activities for which said salesmen were paid

and which produced certain contracts and gross receipts were of such a local nature as to justify the imposition of a State tax upon the income produced by these activities (*West Publishing Company v. McColgan*, 328 U. S. 823 (1946)). The present tax is not upon gross receipts but upon income allocated to the State by means of proper fractions.

5 a. The opinion of the Court (p. 9) misconstrues the nature of the Commonwealth's position by concluding that the tax involved is not a property tax on the local property of the defendant, namely, ten automobiles, or on the income from local activities as such, but an attempted excise tax on defendant's interstate commerce business, out of which there were no local activities which are considered as an integral or realistically inseparable part of interstate commerce. The Commonwealth has never contended that the Corporation Income Tax Act imposes a tax upon local property as such; furthermore, it is the position of the Commonwealth that it is immaterial whether or not the tax under consideration is a property tax or an excise tax, since the only test is the incidence of the tax. As pointed out by the Court below (Record, p. 83a) "the incidence of the tax is on the privilege of engaging in local activities as measured by the income derived from those activities". Whether the tax be upon the income produced by activities or upon the privilege of engaging in activities measured by income, it is not a tax on the privilege of engaging in interstate commerce (*West Publishing Company v. McColgan*, supra; *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Co.*, supra; *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80 (1948);

General Trading Co. v. State Tax Commission of the State of Iowa, supra). Further, there is no basis nor does the Court cite any authority for its statement that the formula in the case makes it crystal-clear that the act imposes an excise tax.

6. The opinion of the Court (p. 9), to the effect that the formula used by the act for allocating income, creates an excise tax is directly in conflict with all of the opinions of the Supreme Court of Pennsylvania holding a similar formula as creating a property tax (*Philadelphia v. Samuels,* 338 Pa. 321 (1940); *Blauner's Inc. v. Philadelphia,* 330 Pa. 342 (1938); *Murray et ux. v. Philadelphia et al.,* 364 Pa. 157 (1950); *Federal Drug Company v. Pittsburgh,* 358 Pa. 454 (1948).)

7. The opinion of the Court concludes that the regular and continuous income-producing activities of the appellee within the Commonwealth of Pennsylvania cannot be realistically separated from appellee's interstate commerce business, without stating any reason, justification or legal authority for its conclusion and without defining how such realistic inseparability may be determined (p. 9).

8. The opinion of the Court erroneously compares the value of appellee's property in Pennsylvania ($13,569) with the tax of $5798.78 assessed on the basis of the allocation formula applied to its income. The Court's statement would imply that the amount of the tax is almost 50% of the entire value of appellee's property in the State. This statement overlooks the fact that said tax is not imposed upon said property but upon income produced by the activities of salesmen, demonstrators, delivery and use of automobiles.

It also overlooks the important fact that if the only allocating factor applicable to the appellee's activities in Pennsylvania was property represented by its automobiles, the tax would be $95.26 instead of $5798.78 (Record, p. 28a), and that a property fraction alone has been held to be a proper basis for assigning income to a State. *Underwood Typewriter v. Chamberlain,* 254 U. S. 113 (1920).

The said tax of $5798.78 equals less than 1.03 of the gross receipts realized by appellee from the activities of its employees within the Commonwealth of Pennsylvania as compared to the 50% that the tax amounted to in the case of *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 443-444, which the Court cited to illustrate the inequality of such tax.

9. The opinion of the Court (pp. 11 and 12) fails to give proper consideration to the cases of *Memphis Natural Gas Co. v. Stone,* supra, and *West Publishing Co. v. McColgan,* supra, and erred in concluding that in those cases the extent of the property located in the State distinguished them from the instant case, whereas the activities in the instant case are practically identical with those in the *West Publishing Co.* case and far more extensive than those in the *Memphis* case.

10. The opinion of the Court below misinterprets in its own opinion in the case of *Roy Stone Transfer Corporation v. Messner,* supra, and fails to follow the rules laid down therein for determining the nature of activities as local or otherwise. The conclusion of the *Roy Stone* case was first based upon the fact that the corporation had no tangible or intangible property within the Commonwealth of Pennsylvania; the appel-

lee does have tangible property within the Commonwealth; secondly, that the corporation paid no wages and salaries in Pennsylvania; in the instant case, the appellee pays its employees $100,590 for services performed in Pennsylvania (15a); and finally, that *Roy Stone* made no contracts and received no orders in Pennsylvania, whereas in the instant case appellee's employees working in Pennsylvania produced orders in the amount of $1,640,455 (36a).

WHEREFORE, for the reasons advanced in the foregoing petition and the brief for the Commonwealth, a reargument should be granted to the Commonwealth of Pennsylvania in the above-entitled appeal.

Respectfully submitted,

EDWARD FRIEDMAN
Deputy Attorney General

HERBERT B. COHEN
Attorney General
Attorneys for Appellant, Petitioner

Commonwealth of Pennsylvania
County of Dauphin ss:

EDWARD FRIEDMAN, being duly sworn according to law, deposes and says that he is one of the attorneys for the appellant and that the foregoing petition for reargument and statements made therein are all presented in good faith, and that the said petition is not filed for the purpose of delay.

(s) EDWARD FRIEDMAN
EDWARD FRIEDMAN

Sworn to and subscribed
before me this 5th day
of July, 1956.

(s) MINA J. WELD
Notary Public

My Commission Expires March 1, 1960
Harrisburg, Pa. Dauphin County

(Seal)

IN THE

Supreme Court of the United States

October Term, 1956.

No. 631.

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

RAFFERTY BOROUGH COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE

Supreme Court of the United States.

October Term, 1956.

No. 531.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

EASTMAN KODAK COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Eastman Kodak Company, respectfully prays that the Petition for a Writ of Certiorari filed in the above entitled case be denied.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

1. Where the only business carried on within a state by a foreign corporation is exclusively interstate commerce, is the corporation subject to a state corporation tax which the Supreme Court of the state, specifically in view of commerce clause limitations, has determined to be an excise tax imposed for the privilege of doing business in the state?

2. Where a foreign manufacturing company maintains no office or place of business and no inventory within the taxing state, and where its only activities within the taxing state consist of the solicitation of sales and the demonstration of its products by employees who are supervised and directed from offices maintained outside of the taxing state, all such orders being accepted at outside offices and filled by interstate shipment by common carrier to the buyer in the state, and the only property of the corporation within the state consists of company titled passenger automobiles in the possession of its employees and used by them in carrying on the foregoing activities within the state, may such activities be severed from the interstate business of the corporation, be regarded as a local intra-state business, and be made the subject of a state corporation tax imposed for the privilege of doing business, the effect of which would be to tax an apportioned part of the entire business of the corporation, including its interstate business, and not merely the (now assumed) separable local intra-state business?

COUNTER STATEMENT OF THE CASE.

In its Statement of the Case and throughout its Petition, petitioner repeatedly refers to the tax involved as a property tax on income.

The issue as to the exact character of the tax in view of commerce clause limitations was squarely presented to and considered by both the trial court and the Supreme Court of Pennsylvania. After full consideration, the Supreme Court of Pennsylvania concluded (affirming the trial court),

> "Notwithstanding the fact that the Act seeks to impose what it calls a property tax, it is clear that the tax, at least as far as the present defendant is concerned, is an excise tax for the privilege of doing business in Pennsylvania. *Cf. Roy Stone Transfer Corp. v. Messner,* 377 Pa., supra. The formula which the Commonwealth applies to this defendant makes crystal clear, if it were not otherwise so, that this tax is not a property tax on the local property of defendant, namely ten automobiles or on the income from local activities as such—it is an attempted excise tax on defendant's interstate commerce business out of which there were no local activities which could be considered as not an integral or realistically inseparable part of interstate commerce." (Pet., p. 46-47)

Respondent believes it is a reference pertinent to a proper Statement of the Case that the highest court of the state has already construed the state law as imposing an excise tax for the privilege of doing business and not a property tax on income nor a tax on income from local property or local activities as petitioner continues to assume and aver in its Statement of the Case and elsewhere throughout the Petition.

Respondent, Eastman Kodak Company, is a business corporation organized under the laws of the state of New Jersey on October 24, 1901, having its principal office and manufacturing plant at Rochester, New York (R. p. 11a).

During the calendar year 1951 respondent was engaged in the business of manufacturing and selling photographic equipment and supplies, acetate yarn and staple, plastics and chemicals. Its executive and administrative activities were carried on wholly outside of Pennsylvania, principally at Rochester, New York. All manufacturing, processing, production and research activities were carried on wholly outside of Pennsylvania. Respondent did not maintain any office or place of business anywhere in Pennsylvania. With the exception of certain automobiles used by respondent's salesmen, all of respondent's assets, both tangible and intangible, were owned, held and used by respondent wholly outside of Pennsylvania. During the year 1951 certain of respondent's employees who resided in Pennsylvania had exclusive custody and possession of Company-owned passenger automobiles, registered and titled in respondent's name and ownership in Pennsylvania (R., p. 11a-12a).

During the year 1951, the respondent had three salesmen and eleven technical representatives who resided in Pennsylvania. The salesmen called on photographic dealers in Pennsylvania to solicit orders for company products. The technical representatives demonstrated to dealers and other users of photographic products the proper method of using such products. The technical representatives did not solicit or take orders for respondent (R., p. 12a).

All of respondent's employees who performed any services in Pennsylvania were paid on a straight salary basis, and the respondent reimbursed each such employee for all travel expense, including the cost of operating the company-owned automobiles assigned to such salesmen or representatives. One of the three salesmen and four of the eleven technical representatives who resided in Pennsylvania performed all of their services in Pennsylvania. Two of the salesmen and seven of the technical representatives who resided in Pennsylvania performed a part of their services in Pennsylvania and a part of their services outside of Pennsylvania. In addition to the foregoing sales-

men and technical representatives residing in Pennsylvania, the respondent also had nine salesmen and ten technical representatives residing outside of Pennsylvania but who performed a part of their services in Pennsylvania and a part of their services outside of Pennsylvania (R., p. 12a-13a).

All orders for the purchase of respondent's products, including such orders taken by respondent's salesmen performing services in Pennsylvania, were subject to acceptance at places of business maintained by respondent outside of Pennsylvania and, if accepted, all such orders were filled from inventories manufactured and maintained outside of Pennsylvania and transported for delivery into Pennsylvania by common carrier (R. p. 13a).

Section 1001 of the Pennsylvania Business Corporation Law (15 P. S. 2852-1001) provides:

> "Section 1001: Admission of Foreign Business Corporations.—A foreign business corporation, before doing any business in this Commonwealth, shall procure a certificate of authority to do so from the Department of State, in the manner hereinafter provided in this article, unless the entire business operations of the corporation within this Commonwealth are within the protection of the Commerce Clause of the Federal Constitution, in which event the corporation may engage in such business operations without procuring a certificate of authority."

It is a stipulated fact that none of respondent's activities in Pennsylvania were of such a nature as to require it to obtain a certificate of authority (R. 11a, Par. 1).

ARGUMENT.

1. A Foreign Corporation Engaged Exclusively in Interstate Commerce Is Not Subject to a State Tax Which the Highest Court of the State Has Held to Be Imposed for the Privilege of Doing Business.

This case is ruled squarely by *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1950). The extraordinary procedural course of the *Spector* case is summarized in the opinion of this Court in 340 U. S. pp. 603-605. The case involved the validity under the commerce clause of the Connecticut Corporation Business Tax Act of 1935 as applied to a Missouri corporation engaged exclusively in interstate trucking. *Spector* instituted the original action in the United States District Court to enjoin collection of the tax and for a declaratory judgment as to its liability. The District Court granted the injunction. The Court of Appeals for the Second Circuit reversed, holding that the tax applied to *Spector* and did not violate the commerce clause. This Court granted certiorari but remanded to the District Court for the reasons set forth in its opinion at 323 U. S. 101 (1944).

These reasons were that validity of the tax under the commerce clause could not be considered and determined by this Court until the highest court of the state had determined the subject of the tax:

> ". . . It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below.
>
> Answers to all these questions must precede consideration of the Commerce Clause. To none have we an authoritative answer. Nor can we give one. Only

the Supreme Court of Errors of Connecticut can give such an answer. But this tax has not yet been considered or construed by the Connecticut courts. We have no authoritative pronouncements to guide us as to its nature and application. . . ."

In its subsequent opinion the Supreme Court of Errors of the State of Conecticut held the Connecticut Corporation Business Tax Act to be an excise tax upon the franchise of corporations for the privilege of carrying on or doing business in the state. *Spector Motor Service Co. v. Walsh*, 135 Conn. 37, 61 A. 2d 89 (1948).

This Court again granted certiorari and after full consideration concluded that the tax was invalid as a violation of the commerce clause. The substance of this Court's opinion is indicated in the following excerpts:

"The vital issue which remains is whether the application of the tax to petitioner violates the Commerce Clause of the Federal Constitution. We come to that issue now with the benefit of a statement from the state court of final jurisdiction showing exactly what it is that the State has sought to tax. The all-important 'operating incidence' of the tax is thus made clear. After full consideration and with knowledge that its statement would be made the basis of determining the validity of the application of the tax under the Commerce Clause, that court said:

'The tax is then a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign. . . .' (340 U. S. pp. 605-606)

• • •

"This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character. The constitutional infirmity of such

a tax persists no matter how fairly it is apportioned to business done within the state. *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203 (measured by percentages of 'corporate excess' and net income); *Ozark Pipe Line Corp. v. Monier,* 266 U. S. 555 (measured by percentage of capital stock and surplus). See *Interstate Pipe Line Co. v. Stone,* 337 U. S. 662, 669, et seq. (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); *Joseph v. Carter & Weekes Co.,* 330 U. S. 422; *Freeman v. Hewit,* supra." (340 U. S., p. 609)

• • •

"In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—*M'Culloch v. Maryland,* supra.

The judgment of the Court of Appeals, which reversed that of the District Court, is accordingly *Reversed.*" (340 U. S., p. 610)

The analogy between the commerce clause issue in the *Spector* case and the present case seems perfect. The issue as to the true subject and nature of the Pennsylvania Corporation Income Tax in view of commerce clause restrictions was recognized as the primary issue in the trial court at both the original trial and on exceptions and in the Commonwealth's appeal in the Supreme Court of Pennsylvania. Thus, as in the *Spector* case, the consideration and determination of the true character and subject of the tax by the Pennsylvania Supreme Court was not a casual dictum but a conscious and deliberate determination of the question by that Court in full realization that as an excise tax imposed for the privilege of doing business the tax

would fall under the commerce clause under the principle of the *Spector* case.

Addressing itself to the question as to the true character of the tax, the Dauphin County Court in its original opinion states,

> "Our Supreme Court pointed out that although the Act of 1951 is called a property tax, the incidence of the tax determines its character. (Cf. Railway Express Agency, Inc. v. Commonwealth of Virginia, 347 U. S. 359 (1954) affirming this principle.) . . ." (R., p. 72a)
>
> ". . . We believe the impact of the tax imposed by the Act of 1951 under the facts in the instant case is on the defendant's privilege of engaging in interstate commerce. . . ." (R., p. 73a)

and in its Conclusions of Law the Court held:

> "The incidence of the tax imposed by the Act of 1951 is on defendant's privilege of engaging in interstate commerce, and the Act is therefore unconstitutional in its application to the defendant under the facts in this case." (R., p. 74a)

In its opinion on the Commonwealth's exceptions, the trial Court states,

> ". . . In disposing of the Commonwealth's exceptions, it is important at the outset to understand the nature of the tax imposed by the Act of 1951, and this must be determined from the language of the statute. That statute, in our judgment, imposed an excise or privilege tax, notwithstanding the fact that it is referred to as a 'property' tax, not only in the title of the Act, but also in § 3, the imposition section of the statute." (R., pp. 79a-80a)
>
> "For the foregoing reasons, we conclude that the tax imposed by the Act of 1951 is a privilege tax—that

is a tax on the privilege of engaging in local activities and is measured by the income derived from those activities. . . ." (R., p. 90a)

"All of the Commonwealth's exceptions involved basically the single contention that we were in error in our opinion of January 31, 1955 in concluding that the resettlement of this tax by the fiscal officers was in violation of the Commerce Clause, since it imposed a tax on the defendant's privilege of engaging in interstate commerce. We have fully discussed herein all the matters raised by the exceptions, and for the reasons hereinabove set forth the exceptions of the Commonwealth must be overruled." (R., p. 99a)

In its opinion affirming the lower court on this point the Pennsylvania Supreme Court states,

"Notwithstanding the fact that the Act seeks to impose what it calls a property tax, it is clear that the tax, at least as far as the present defendant is concerned, is an excise tax for the privilege of doing business in Pennsylvania. Cf. *Roy Stone Transfer Corp. v. Messner*, 377 Pa., supra. The formula which the Commonwealth applies to this defendant makes crystal clear, if it were not otherwise so, that this tax is not a property tax on the local property of defendant, namely, ten automobiles or on the income from local activities as such—it is an attempted excise tax on defendant's interstate commerce business out of which there were no local activities which could be considered as not an integral or realistically inseparable part of interstate commerce." (Pet., pp. 46-47)

All of the foregoing conclusions by the Supreme Court of Pennsylvania and the Dauphin County Court were based on exhaustive analysis of the statute and reasoning based thereon as fully set forth in the respective opinions.

The conclusion by the Pennsylvania Supreme Court on this question is consistent with its determination of the

same issue in the only previous case involving the same tax in *Roy Stone Transfer Corporation v. Messner,* 337 Pa. 234, 103 A. 2d 700 (1954), and is consistent in principle with its earlier decisions in *Commonwealth v. Columbia Gas and Electric Corporation,* 336 Pa. 209, 8 A. 2d 404 (1939), and *Fischer v. City of Pittsburgh,* 383 Pa. 138, 118 A. 2d 157 (1955).

The conclusion by the Pennsylvania Supreme Court that the tax is imposed for the privilege of doing business is in accord with the reasoning and conclusion of the Supreme Court of Errors of the State of Connecticut in its decision of the *Spector* case, *supra,* which this Court accepted without question, and is also consistent in principle with the opinions of this Court in *Railway Express Agency, Inc. v. Virginia,* 347 U. S. 359, 74 S. Ct. 558 (1954), and *Flint v. Stone Tracy,* 220 U. S. 107, 31 S. Ct. 343 (1911).

2. Respondent Is Engaged Exclusively in Interstate Commerce.

The Pennsylvania Supreme Court, after full consideration, held that the activities carried on by respondent in Pennsylvania as described *supra* in respondent's Statement of the Case (all taken verbatim from the Stipulation of Facts), could not be segregated from respondent's interstate business and be made the subject of a tax imposed for the privilege of doing business.

The Pennsylvania Supreme Court quoted from *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U. S. 157, 74 S. Ct. 396 (1954) that

> "a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." (Pet., p. 45)

Citing *Norton Company v. Illinois,* 340 U. S. 534, 71 S. Ct. 377 (1951) (Pet., p. 44), the Pennsylvania Supreme Court concluded that respondent's activities in Pennsylvania consisting of the solicitation of interstate sales

and the demonstration of its products in aid thereof could not "realistically be separated from" respondent's interstate business, stating,

> "We do not consider these additional factors (i.e., solicitation and product demonstration) sufficient to constitute local activities within the meaning of the decided cases." (Pet., p. 42)

This conclusion by the Pennsylvania Supreme Court is consistent with the *Norton* case cited and with *Memphis Steam Laundry Cleaner Co. v. Stone,* 342 U. S. 389, 72 S. Ct. 424 (1952) and a host of decisions by this Court cited in these decisions, all dealing directly with solicitation of interstate sales under the commerce clause. In *Memphis Steam Laundry Cleaner Co., supra,* this Court stated, at page 392,

> "In the long line of 'drummer' cases . . . this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce. As the Court noted last term in a case involving door-to-door solicitation of interstate business, 'Interstate commerce itself knocks on the local door.' "

Any other conclusion under the facts of this case would have been in conflict with the unvaried pronouncements of this Court that the solicitation of interstate sales may not be made the subject of an excise tax imposed for the privilege of doing business.

Petitioner argues to the contrary that solicitation of interstate sales is a severable taxable local activity if carried on continuously and regularly, and claims that on this issue the decision of the Pennsylvania Supreme Court is in conflict with *Nippert v. Richmond,* 327 U. S. 416, 66

S. Ct. 586 (1946); *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945); *McGoldrick v. Berwind White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388 (1940); *General Trading Co. v. State Tax Commission of the State of Iowa*, 322 U. S. 335, 64 S. Ct. 1028 (1944); *Miller Bros. v. Maryland*, 347 U. S. 340, 74 S. Ct. 535 (1954); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 68 S. Ct. 1475 (1948); and *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1363 (1946).

At argument in both the trial Court and the Pennsylvania Supreme Court, petitioner succeeded in temporarily confusing the Court by quoting from these cases, particularly the *Nippert* and *International Shoe Co.* cases. These two cases recognize that regular and continuous solicitation of interstate sales may constitute "doing business" in the due process sense of territorial jurisdiction, which respondent does not deny. In its opinion in the *Nippert* case this Court states,

> "In view of the ruling in *International Shoe Co. v. Washington, supra*, we put aside any suggestion that 'solicitation,' when conducted regularly and continuously within the State, so as to constitute a course of business, may not be 'doing business' just as is the making of delivery at any rate for the purpose of focusing a tax *which in other respects would be sustainable.* But we do not think the tax as it was applied in this case either conforms to those conditions of regularity and continuity *or avoids other prohibited effects.*" (327 U. S. pp. 423-4, 426) (Emphasis supplied.)

This Court then proceeded to hold the Richmond tax (license tax on salesmen soliciting interstate sales) void under the commerce clause, this being the "other prohibited effect(s)."

Thus, instead of being "authority for the imposition of the tax upon this respondent" as petitioner avers (Petition,

30-31), the *Nippert* case, insofar as it has any bearing, actually supports the decision of the Pennsylvania Supreme Court in this proceeding.

In the *International Shoe Co.* case this Court sustained the state of Washington unemployment tax as applied to salesmen regularly and continuously soliciting interstate sales. It was held that such activity establishes jurisdiction to enforce the collection of a tax which is valid in other respects. No violation of the commerce clause was involved because by 53 Stat. 1391, 62 U. S. C. par. 1606, Congress had exonerated state unemployment taxes from the limitations of the commerce clause.

McGoldrick v. Berwind White Coal Mining Co. involved a state sales tax in which local delivery was held to be a severable local incident sufficient to support such a tax, but in its opinion this Court itself was careful to distinguish the drummer type of case involving the type of tax now under consideration (309 U. S. 33, at 48). This distinction was reiterated and again emphasized by this Court in the *Nippert* case (327 U. S. at 423) and the same principle more recently applied by this court in *Norton Company v. Illinois*, where the Court states,

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. McLeod v. Dilworth Co., 322 U. S. 327 (sales tax). Of course, a state imposing a sales or use tax can more easily meet this burden, because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor."

For similar reasons, *General Trading Co. v. State Tax Commission of the State of Iowa* and *Miller v. Maryland*

have no bearing whatever on the present case. Both involve state use taxes and the issue was whether under the facts the state had territorial jurisdiction to enforce collection from an out of state vendor of a use tax imposed on the local vendee. The commerce clause was not determinative in either case.

In *Memphis Natural Gas v. Stone* this Court sustained a Mississippi franchise tax as applied to an interstate pipe line company owning 135 miles of pipe line within the state the maintenance of which, together with its usual appurtenances and equipment, required the constant attention and services of its employees of necessity performed within the state. This case has no relevancy in view of the facts in the present case.

In *West Publishing Co. v. McColgan* this Court affirmed per curiam the decision of the Supreme Court of California sustaining a California corporation tax as applied to a corporation maintaining local offices and whose employees, working out of local offices, solicited orders, received payments, adjusted complaints, and collected delinquent accounts. It was on the basis of these factual differences that the Pennsylvania Supreme Court properly distinguished the *West Publishing Co.* case in the present proceeding. Wholly aside from such factual distinctions, it is pertinent to note that the California Supreme Court itself would have reached the opposite conclusion if the tax involved, as here, had been determined to have been imposed as an excise for the privilege of doing business. In its opinion the California Supreme Court states:

> "* * * plaintiff overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in interstate commerce and a tax whose subject is the net income from such commerce. * * *" (Pet., p. 20)

Respondent therefore believes and submits that every decision of this Court cited and alleged by petitioner as

being in conflict with the decision of the Pennsylvania Supreme Court has nothing whatever to do with the issue, is clearly distinguishable, or actually supports the decision.

CONCLUSION.

Respondent submits that in its decision the Pennsylvania Supreme Court has correctly interpreted, applied and followed the ruling cases of this Court and that the Petition should therefore be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 8 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 531 October Term, 1956

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

EASTMAN KODAK COMPANY,
Respondent

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE
UNITED STATES

No. 531 October Term, 1956

Commonwealth of Pennsylvania,
Petitioner

v.

Eastman Kodak Company,
Respondent

PETITIONER'S REPLY BRIEF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, the Commonwealth of Pennsylvania, respectfully submits the following brief in reply to respondent's brief in opposition to petition for a writ of certiorari to the Supreme Court of Pennsylvania.

ARGUMENT

Respondent bases its opposition to the granting of the petition for a writ of certiorari to the Supreme Court of Pennsylvania upon three grounds, all of which can be demonstrated to be without any merit whatsoever.

Respondent first asserts that the Supreme Court of Pennsylvania defined the Corporation Income Tax Law as imposing a tax upon the privilege of doing business within the Commonwealth of Pennsylvania; secondly, that regardless of the language of the statute or the realities of the situation, the Supreme Court of the United States is bound by such definition; and finally, that the fact that respondent is engaged exclusively in interstate commerce necessitates the determination of the issue in its favor.

Petitioner concedes and at no time denied that respondent is exclusively engaged in interstate commerce in Pennsylvania. However, it contends that the respondent's regular and continuous income producing activities within the Commonwealth of Pennsylvania are of such a local nature as to authorize the imposition of a State tax upon the income produced thereby. If these activities are not realistically separable from interstate commerce, then there can be no case of separable local activities.

The opinions of the Pennsylvania courts point out their confusion with the subject and the need for a judicial definition and standard as to what constitutes separable local activities in interstate commerce.

I.

THE SUPREME COURT OF PENNSYLVANIA DID NOT DESIGNATE THE TAX IMPOSED BY THE CORPORATION INCOME TAX ACT AS A TAX UPON THE PRIVILEGE OF DOING BUSINESS IN PENNSYLVANIA

Petitioner asserts that the Legislature of the Commonwealth of Pennsylvania in enacting the statute under consideration definitely and deliberately manifested a clear intention to impose a property tax on income derived from sources within the Commonwealth of Pennsylvania (petition for writ of certiorari, pages 6 and 7). Furthermore, both the Court of Common Pleas of Dauphin County and the Supreme Court of Pennsylvania were particularly careful to point out that they were not passing upon the constitutionality of the Corporation Income Tax Law generally, but only as it applied to the respondent, Eastman Kodak Company. The Dauphin County Court stated (Record 79a):

> "* * * We take occasion to point out that, this matter being here on an appeal from a tax resettlement by the fiscal officers of the Commonwealth, *we did not in our opinion invalidate the Act of 1951, nor do we now invalidate this statute.* We do hold that the *Act is inapplicable to this defendant under the facts involved in the defendant's appeal,* because under these facts the tax settled against the defendant burdened the inter-

state commerce in which the defendant was engaged."

(Emphasis supplied)

Said Court further indicated that it did not consider the tax involved as a tax upon the privilege of engaging in interstate commerce, but as a tax upon the privilege of engaging in local activities in said commerce (Record 83a):

"* * * As to corporations engaged in interstate commerce, *the incidence of the tax on the privilege of engaging in local activities* as measured by the income derived from those activities. * * *"

(Emphasis supplied)

Said Court stated further at Record 90a:

"For the foregoing reasons, we conclude that the tax imposed by the Act of 1951 is a privilege tax—that is a tax on the privilege of engaging in local activities and is measured by the income derived from those activities. The question then is whether in levying the tax against the defendant which is engaged exclusively in interstate commerce, the Commonwealth is imposing a tax on defendant's privilege of engaging in interstate commerce."

And further at Record 94a:

"* * * Since this is a tax on the privilege of carrying on an activity, and since the activity is an integral part of interstate commerce, which cannot realistically be separated therefrom, it follows that the tax is imposed on the defendant's privilege of engaging in interstate commerce.***"

The error of the Dauphin County Court is apparent. It held the Corporation Income Tax Law to be constitutional, but found that the respondent was not engaged in any taxable local activities. It then concluded that this fact changed the tax from a property tax on income to a tax on the privilege of engaging in interstate commerce.

The opinion of the Supreme Court of Pennsylvania (petition for writ of certiorari, appendix A) likewise definitely indicates that said Court did not hold that the Corporation Income Tax Law imposed a tax upon the privilege of doing business in Pennsylvania, but reached the conclusion that, as applied to the present defendant, the tax was of that nature because of its determination that there were no local activities performed by respondent in Pennsylvania which could be considered as not an integral or realistically separable part of interstate commerce. The Pennsylvania Supreme Court first concluded that respondent's activities in Pennsylvania were not of such a local nature as to be realistically separable from interstate commerce, and that consequently a tax upon the income produced by such local activities did constitute a tax upon the privilege of engaging in interstate commerce.

It is submitted that the incidence of the tax is clearly upon income derived from local activities; if there are no local activities which can be separated from the interstate activity of the respondent, then the tax does not apply to it. However, the absence of such local activities does not convert an otherwise proper tax into a tax upon the privilege of engaging in interstate commerce. This is demonstrated by the fact that the

Court, recognizing that the tax could properly apply to a corporation performing local activities which it would consider to be separable from the interstate commerce business of the taxpayer, confined the effect of its opinion to this particular respondent. See petition for writ of certiorari, appendix A, page 44, where the Supreme Court of Pennsylvania states:

> "* * * * * * * 2. A state may impose and collect taxes on corporations engaged exclusively in interstate commerce under the following conditions: (a) The tax must be predicated upon the ownership of property within the taxing State, or upon local activities which occur within the State and are not an integral or realistically inseparable part of interstate commerce. (b) The property or activity taxed must be of such a local nature that it may not become the object of multiple State taxation. (c) The tax must be fair and reasonable and there must be no discrimination between corporations engaged in interstate and intrastate commerce.' "

And again at page 46:

> "*Notwithstanding the fact that the Act seeks to impose what it calls a property tax, it is clear that the tax, at least as far as the present defendant is concerned, is an excise tax for the privilege of doing business in Pennsylvania.* Cf. Roy Stone Transfer Corp. v. Messner, 377 Pa., supra. The formula which the Commonwealth applies to this defendant makes crystal clear, if it were not otherwise so, that this tax is not a property tax on the local property of defendant, namely ten automobiles *or on the income from local activities as such*

—it is an attempted excise tax on defendant's interstate commerce business *out of which there were no local activities which could be considered as not an integral or realistically inseparable part of interstate commerce.*"

(Emphasis supplied)

Finally, the Court in its conclusion makes it clear that its opinion applies only to the liability of the respondent, Eastman Kodak Company, to the tax in question (page 49):

"For the foregoing reasons, we hold that the Corporation Income Tax Law of 1951 *in its application to this defendant* is a violation of the Interstate Commerce Clause and therefore unconstitutional."

(Emphasis supplied)

Petitioner agrees that the incidence of the tax determines its validity and contends that, even though the tax falls flatly on interstate commerce, so long as its incidence is upon a local portion thereof, it must be sustained. See the concurring opinion of Mr. Justice Rutledge in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80 (1948), at page 98:

"* * * The incidence of that tax is flatly on the commerce, though only on the local portion of it. So here I do not think that the local activities for the protection of which the Mississippi tax purports in terms to be laid become separate from the interstate business which petitioner conducts in Mississippi, either by reason of the apportionment or otherwise. But they are incidents of carrying on that business taking place in Mississippi

> and only there, for which Mississippi affords protection received from no other state or the United States. Nor can any other state give that protection. For that portion of the business and the protection given it, I think the state is entitled to levy such a tax as has been placed here. Nothing in the commerce clause or its great purposes forbids such an exaction. * * * "

In the recent case of *Texas Gas Transmission Corporation v. Atkins*, 270 S. W. 2d 384 (Supreme Court of Tennessee) (1954), affirmed by the United States Supreme Court November, 1954, a Tennessee excise and franchise tax upon the privilege of doing business within the State in the corporate form was sustained, even though all of the corporation's activities within the State were in interstate commerce.

Respondent was successful in persuading the Pennsylvania courts to adopt its erroneous contention that the tax in question was an excise or privilege tax and not a property tax, and that as such it imposed a tax upon the privilege of engaging in interstate commerce. The fallacy of this argument is apparent. The question is not whether the tax under consideration is a privilege tax, but whether it purports to impose a tax upon the privilege of engaging in interstate commerce. In this connection we again quote the following statement of Mr. Justice Brandeis in *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113 (1920):

> "This tax is based upon the net profits earned within the state. That a tax measured by net profits is valid, although these profits may have been derived from in part, or indeed mainly, from interstate commerce is settled. (citations) *Wheth-*

er it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

(Emphasis supplied)

The inconsistency and confusion of the Pennsylvania courts in defining the nature of State taxes is demonstrated by its irreconcilable decisions with respect to the incidence of the tax in question (the Corporation Income Tax Law) and the Corporate Net Income Tax Act, the Act of May 16, 1935, P. L. 208, as reenacted and amended. The latter act by its terms imposes an excise tax upon the net income of corporations doing business in the Commonwealth and provides in Section 3:

> "Section 3. Imposition of Tax.—Every corporation * * * shall pay for the privilege of doing business in this Commonwealth, or having capital or property employed or used in this Commonwealth, by or in the name of itself, or any person, * * * a State excise tax at the rate of six per centum per annum upon each dollar of net income of such corporation * * * "

Notwithstanding the language of a statute to the effect that it imposes an excise tax for the privilege of doing business, the Supreme Court of Pennsylvania in *Blauner's, Inc. v. Philadelphia,* 330 Pa. 342 (1938), and *City and County of Philadelphia v. Samuels,* 338 Pa. 321 (1940) held said tax to be a property tax.

Thus the Supreme Court of Pennsylvania holds that an excise tax imposed for the privilege of doing business is a property tax, and that a property tax imposed upon income derived from local activities within the Commonwealth is an excise tax.

II.

THE PENNSYLVANIA SUPREME COURT'S DESIGNATION OF THE INCIDENCE OF A TAX IS NOT CONCLUSIVE UPON THE SUPREME COURT OF THE UNITED STATES

Respondent contends that the conclusion of the Supreme Court of Pennsylvania that the tax in question, as applied to this respondent, is an excise tax is binding upon the Supreme Court of the United States. It contends further that, regardless of the clearness of the language of the Legislature in defining the nature of the tax and the error of the Supreme Court of Pennsylvania in ignoring the Legislature's mandate, the Supreme Court of the United States is nonetheless concluded by such error. It relies upon the fact that in *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602 (1951), the Supreme Court first remanded the case to the Supreme Court of Connecticut for determination of the subject matter of the tax involved.

Any suggestion that such procedure justified a conclusion that your Honorable Court will permit itself to be shackled by an erroneous definition respecting the subject matter of a tax or the incidence thereof is completely answered in the case of *Railway Express Agency v. Virginia,* 347 U. S. 359 (1954), wherein your Honorable Court stated:

> "The State counters with the contention that we should regard this, not as a privilege tax, even

though it was labeled as such by the statute imposing it, but, instead, as a property tax measured by gross income and laid on the intangible value of good-will or going-concern status. The Corporation Commission said that the physical properties were assessed at dead value or bare-bones value for local taxation, while here the 'live, or going concern value' is being separately taxed by the State 'for the protection and services rendered by it.' The State's highest court approved. While great respect is due these conclusions, *it has long been held that in a case involving the line between permissible state taxation of property at its full value, including going-concern value, and prohibited taxation of gross receipts from interstate commerce, 'neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect,'* Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, in which inquiry 'we are concerned only with its practical operations.' Lawrence v. State Tax Comm'n, 286 U. S. 276, 280. See Wisconsin v. J. C. Penney Co., 311 U. S. 435, 443-444.

"We start with the taxing statute, in which the Legislature gave a trinity of characterizations to the tax. It was declared to be in addition to the 'property tax,' not an additional property tax; it was named 'an annual license tax,' and it was laid 'for the privilege of doing business in this State.' It is not an easy conclusion that the Legislature did not know the actual character of the tax it was laying or that it misconceived what it was

taxing. *If the tax was in purpose and effect one on property, tangible or intangible, no reason is apparent for casting it in the mold of a privilege tax.* Indeed, as the Corporation Commission finally said, the opposite is true, and some other basis for the tax must be found if it is to be saved as valid. This both the Commission and the court below sought to do.

"The Virginia court, in this and earlier cases, considered that gross earnings measure the value of a good-will or going-concern element which is a separate intangible property of the company."

(Emphasis supplied)

The refusal of your Honorable Court to accept the Virginia court's determination as to the nature of the tax is specifically pointed out by Mr. Justice Clark in his dissenting opinion at page 370 of the opinion:

"This Court, however, refuses to accept the Virginia court's determination and assigns to the Virginia tax the same 'privilege' label that condemned the tax in Spector. Although the Court refused to pierce the label in Spector, I do not dispute its right to re-examine a label affixed by a state court. In some cases the label may be wholly inconsistent with the state's taxing scheme; or it may be true—though I doubt it—that a state court might deliberately misbrand a tax to avoid decisions of this Court. * * * "

CONCLUSION

Petitioner submits that the Supreme Court of Pennsylvania based its conclusion that the Pennsylvania Corporation Income Tax Law imposed a tax upon the privilege of engaging in interstate commerce in so far as it applied to respondent, Eastman Kodak Company, upon the erroneous conclusion that respondent's activities in Pennsylvania were not realistically separable from its interstate commerce business. The absence of any rule or standard regarding the matter of separability of local activities from interstate commerce produced that error. It is, therefore, respectfully submitted that this subject is of such a fundamental nature that it requires consideration and determination by your Honorable Court, and that no substantial reason has been asserted by respondent which would justify a refusal to grant the writ of certiorari prayed for.

Petitioner further submits that the opinion of the Supreme Court of Pennsylvania in defining the nature of said tax does not preclude your Honorable Court from examining the same in order to determine its true character.

Respectfully submitted,

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